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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-617

ELMER GERTZ,

Petitioner,

vs.

ROBERT WELCH, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Justices of the Supreme Court of the United States:

Petitioner, Elmer Gertz, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the United States District Court for the Northern District of Illinois, Eastern Division, granting

a judgment notwithstanding the verdict in favor of defendant after a jury verdict awarding plaintiff Fifty Thousand Dollars ($50,000.00) for libel.

This cause is a diversity action for libel, arising out of the publication by defendant of an article entitled "Frame up, Richard Nuccio and the War on Police", in its monthly magazine "American Opinion" and thereafter in a pamphlet reprint. Plaintiff, an attorney, contended that this article libeled him by calling him, among other epithets, a "Leninist" and "Communist-fronter" and "Red." He was awarded a jury verdict of Fifty Thousand Dollars ($50,000.00). Subsequent to the entry of this verdict, the trial court entered judgment notwithstanding the verdict in favor of defendant. The judgment was affirmed by the Court of Appeals.

OPINIONS BELOW.

The opinion of the Court of Appeals is as yet unreported, and is reproduced as Appendix "A" to this Petition. The opinion of the District Court is reported at 322 F. Supp. 997, and is reproduced in Appendix "B" to this Petition. The order denying Plaintiff's Petition for Rehearing is not reported and is reproduced in Appendix "C" to this Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 1, 1972. A petition for rehearing with a suggestion for rehearing en banc was filed on August 15, 1972, and denied on September 12, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED.

1. Whether plaintiff, who was referred to and treated in an admittedly defamatory article as a private attorney, was a public figure within the requirements of the First Amendment?

2. Whether an article alleging a communist conspiracy to harass the police, with no evidentiary support therefor, is a matter of such public interest and importance as to require anyone mentioned therein, however peripherally or slightly (as was plaintiff), to prove actual malice in order to recover for libel?

3. Whether plaintiff was denied due process of law as a result of being precluded by the court from introducing evidence of actual malice?

4. Where the court states that, in this case, the law limiting recovery in libel has been narrowed, for the first time, to the greatest permissible extent, is it a violation of due process to tax thousands of dollars in costs against an admitedly defamed attorney, in light of the discretion of the court in assessing costs?

STATEMENT OF THE CASE.

Plaintiff, Elmer Gertz, is, and has been for over 40 years, an attorney licensed to practice before the courts of the State of Illinois, both local and federal, as well as in several other states and this Court. At all times he has enjoyed a high reputation, both as an attorney and as a citizen of the United States. During this period of time he has written reviews and articles and three books. He has often spoken in public and has been a member and officer of various legal and community organizations. Largely because of his preoccupation with his law practice, he was much less active than usual in community organizations, public appearances and writing in the months immediately preceding the publication of defendant's article and the pamphlet reprint thereof. Prior to the publication of that article in April of 1969, he had never held or run for any public office, or held any position from which he had received any remuneration from the government.

In June, 1968, a young man named Ronald Nelson was shot and killed by Richard Nuccio, a police officer of the City of Chicago. Plaintiff was retained as a private attorney for the family of the deceased youth to represent them in private civil suits brought against the police officer in the Circuit Court of Cook County and the United States District Court for the Northern District of Illinois. At no time did plaintiff ever make any public statements of any kind in regard to these cases, nor was he ever publicly quoted as to Nuccio or the cases. While

some newspaper articles appeared regarding the fact that Officer Nuccio had been criminally tried and convicted of murder, none of them referred to plaintiff, with the exception of one or two very short articles which merely stated passingly that he had filed civil suits against Nuccio on behalf of Ronald Nelson's parents.

In March, 1969, the April issue of "American Opinion", published by defendant, appeared on the newstands across the country. It contained as its lead article, "Frame up, Richard Nuccio and the War on Police." This article contained several false and defamatory statements of and concerning plaintiff, among which are the following:

p. 5—

"The file on Elmer Gertz in Chicago Police Intelligence takes a big, Irish cop to lift. According to the Communist *Worker* of December 8, 1964, he has signed a petition to abolish the House Committee on Un-American Activities. On May 12, 1966, he sponsored another such petition, published by the Illinois division of the American Civil Liberties Union—founded by Harry F. Ward, one of the top Communists in the United States. Gertz also was a pallbearer for Jack Ruby, the 'lone fanatic' who killed the 'lone fanatic' who killed the President of the United States. He has been an official of the Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government."

pp. 5-6—

"The Communist parade in April included the usual Communist violence. Apparently, the traitors were practicing for what they planned to do in August. And just as the phony Walker Commission and its *Walker Report* followed the terrorism in August, so a Commission and a report called *Dissent and Disorder* fol-

lowed the terrorism in April, financed by the Roger Baldwin Foundation of Communist Harry Ward's A.C.L.U. After an 'impartial investigation,' the A.C.L.U.'s Commission ridiculed 'the inaccurate impression that the April 27 event was a left wing affair'; exonerated the Communist Chicago Peace Council, which ran it; and naturally blamed the violence the Communists caused on the Chicago police: 'On April 27, at the peace parade of the Chicago Peace Council, the police badly mishandled their task. Brutalizing demonstrators without provocation, they failed to live up to that difficult professionalism which we demand.'"

"And the Chief Counsel for the Commission which committed *Dissent and Disorder* was the same Elmer Gertz who now turns up as lawyer for the Nelsons in the attack on Officer Nuccio."

"In fact, the only thing Chicagoans need to know about Gertz is that he is one of the original officers, and has been Vice President of the Communist National Lawyers Guild—which has been described by the House Committee on Un-American Activities as 'one of the foremost legal bulwarks of the Communist Party'—and which probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democrat Convention."

p. 9—

Below a photograph of Elmer Gertz there appears the following: "Elmer Gertz of Red Guild harasses Nuccio."

p. 10—

"Like millions of other Americans, he was watching an organized attempt to discredit our local police—organized primarily by the Communist National Lawyers Guild, preeminent in which is the same Elmer Gertz who now appears as the Nelsons' lawyer."

p. 12—

"The C.P.C., as you will recall, is the Communist outfit headed by a Communist and defended by Leninist Elmer Gertz, who now turns up as lawyer for the Nelsons."

p. 17—

"Two Chicago Assistant Corporation Counsels warned Nuccio not to testify at the coroner's inquest, for fear what he said might jeopardize their defense against Communist-fronter Gertz." (R. 17)

Not only did this article appear in "American Opinion", but it was also distributed in reprint form in the streets of Chicago, as well as elsewhere. In fact, this is how the article first came to plaintiff's attention.

After looking into the matter to determine liability, plaintiff brought suit almost immediately against defendant. Despite the commencement of suit and service of summons upon defendant and the information contained in the complaint, completely discrediting the defamatory article, distribution of the article, both in magazine and reprint form, continued unabated in substantial amounts, for months afterwards, almost to the very time of trial.

Defendant moved to dismiss the complaint for failure to state a claim upon which relief can be granted, or, alternatively, for failure to satisfy the requisite jurisdictional amount. This motion was denied by the District Court, which held that it was libelous *per se* to falsely label one a Communist. The court went on to hold that since the article dealt with plaintiff's participation as counsel in certain private law suits, it therefore reflected primarily and directly upon his profession and practice of law. The Court held that the charges contained in the article imputed to plaintiff a want of the requisite qualifications to practice

law, as such an imputation must necessarily cast grave doubts upon his qualifications to uphold, apply and interpret our system of laws, which is opposed by Communist theory, and was therefore actionable *per se*.

In conducting the *voir dire* the trial court inquired all of prospective jurors whether they had heard anything about plaintiff. Not one indicated that he was familiar with plaintiff in any way, which the District Court found significant in concluding that plaintiff was not a public figure.

At the trial, defendant made no effort to prove that any of the statements in the article concerning plaintiff were true. It admitted that "prior to the publication of the controverted article, and at the time of the promulgation thereof, this defendant had no knowledge concerning the plaintiff other than the article itself. In publishing the article it relied solely upon the reputation of the free-lance writer, Mr. Stang for accuracy." Despite this, the managing editor of the magazine admitted at the trial that he personally had written in the magazine that the author of the article had conducted extensive research into the Nuccio case and had gotten the facts. He further wrote that the trial of Officer Nuccio was part of the Communist war on police, and that the article was so important that reprints would be made immediately available. He also wrote a caption under plaintiff's picture in the article stating: "Elmer Gertz of Red Guild harasses Nuccio".

The managing editor admitted that his sole source of information for each of these statements was the article itself. He made no attempt to verify any of this information appearing in the article. No other attempt was made by anyone on behalf of defendant to verify this information.

In fact, the idea for the article was generated by the managing editor, who approached the author, informed him of the Nuccio case and requested him to look into the situation, with a view to meeting the specific needs of American Opinion magazine. Defendant considered this a very important article and rushed it into print more quickly than usual. In effect, the article was designed and tailored by defendant, vouched for by it, and edited so as to express defendant's viewpoint.

American Opinion magazine espouses the doctrines and viewpoints of the John Birch Society. The magazine is distributed through American Opinion Book Stores, children of the same corporate father, the John Birch Society. There are approximately 280 of these stores across the country. About 42,000 copies of the magazine were circulated through the subscription list, and 86,000 reprints of the article were distributed across the country by defendant. These magazines and reprints were still being sent out in large numbers in the spring of 1970, months after the filing of the instant cause and service of process.

Plaintiff testified that at no time had he been contacted by anyone regarding the research for this article or any of its allegations. He denied all of the specific defamatory statements concerning him contained therein, including the following:

1. He had never been a member of the League For Industrial Democracy, the Intercollegiate Socialist Society, nor any organization, whether named in the article or otherwise, which purportedly advocated the violent seizure or overthrow of the government.

2. He was never involved in a Peace Parade in 1968 in Chicago, nor at any time.

3. He had no connection whatsoever with the Walker Commission or its Report.

4. He had never heard of "The Red Guild."

5. He has never been a member of the Chicago Peace Council.

6. At no time has he ever espoused a Leninist or Communist doctrine, nor any similar doctrine, nor has he at any time ever been a Leninist or Communist or Marxist nor anything similar.

7. He had been legal counsel for the Sparling Commission, a group of leading citizens, which issued a report entitled "Dissent and Disorder", but none of the members of the Commission was in any way connected with any Communist organization.

8. At no time did he have any connection with any criminal case against Nuccio. He appeared and asked questions at the inquest on the deceased, Ronald Nelson, in behalf of the family. That inquest reached no conclusion as to the cause of death of Ronald. There were also other attorneys present at that inquest, including an attorney for Nuccio.

9. He never attended any of the sessions of any criminal case against Nuccio, nor did he make any public statements regarding either the criminal or civil cases.

Gertz testified that he does not believe in violence of any kind. No evidence to the contrary was offered. He testified as a lawyer with 40 years' experience that no attorney who is a Communist, Leninist or Marxist can properly represent clients who have property, financial or business interests, because Communism negates private property.

Gertz testified that he believes in the institution of private property and has represented clients with property, financial and business interests. Most of his practice has related thereto.

At the time the article was published, the Chicago Police Department had no intelligence file on plaintiff. It was utterly untrue, as claimed in the article, that there was a file on Gertz so big that it "takes a big, Irish cop to lift."

Defendant offered no witnesses to establish any alleged Communist conspiracy against the police and no evidence whatsoever of any kind, character or description to link Gertz with any such alleged conspiracy. Defendant admitted that Gertz is not directly a part of any such conspiracy. In closing argument, counsel for defendant admitted that the charges made by defendant against Gertz are untrue.

Plaintiff requested that defendant be required to produce Alan Stang, the author of the defamatory article, as an adverse witness. On defendant's several times repeated representation that Stang was simply a free-lance writer over whom it had no control, the court refused to require defendant to produce him and denied plaintiff's requested instruction on the matter as to the inferences to be drawn. After the proceedings were over, plaintiff learned for the first time that defendant had deliberately misrepresented the situation to the court; that in fact Stang was a contributing editor of American Opinion and contributing editor, as well, of another John Birch Society Magazine and one of the chief participants in its speakers bureau—an important part of the John Birch apparatus.

The cause was submitted to the jury under instructions which held that plaintiff was not a public figure and which

informed the jury that the article involved herein were libelous *per se*. The jury returned a verdict in favor of plaintiff in the sum of $50,000.00.

After the rendering of this verdict, defendant filed a post-trial motion, upon consideration of which the District Court granted judgment notwithstanding the verdict in favor of defendant, holding that the article "painted the picture of a conspiratorial war being waged by the Communists against the police in general." The court found this subject matter to be clearly one of public interest protected by the First and Fourteenth Amendments, and in addition held that "by representing the victim's family in litigation brought against the policeman, Gertz thrust himself into the vortex of this important public controversy." The court then concluded that in order to recover plaintiff was required to show actual malice, that is, that defendant knew the statements were false at the time it printed them, or that it had made them with reckless disregard as to their truth or falsity. The court concluded that plaintiff had failed to prove such malice and therefore entered judgment in favor of defendant, despite the fact that he had concluded at trial that plaintiff was not required to produce such proof and that, therefore, plaintiff had not offered all of such available evidence of malice.

Plaintiff appealed to the United States Court of Appeals for the Seventh Circuit, which court affirmed the judgment of the trial court.

REASONS FOR GRANTING THE WRIT.

I.

PLAINTIFF WAS NOT SPOKEN OF IN A PUBLIC CAPACITY.

In affirming the decision of the trial court, the United States Court of Appeals for the Seventh Circuit stated:

> "It is one thing to omit the word 'alleged' from an otherwise accurate comment on a newsworthy subject; it is quite another to include a gratuitous and collateral remark about a participant in a public controversy. The omission, even if it makes the comment false, does not enlarge its subject matter beyond the area in which First Amendment protection is properly afforded. The addition of an unnecessary and irrelevant comment about a private individual is not automatically protected simply because it is contained in an article dealing generally with an important subject. Otherwise, a few introductory platitudes might be used as a justification for false and destructive invasions of the privacy of ordinary citizens.
>
> "In this case, the alleged affiliations were quite irrelevant to the murder trial. They were inserted in order to develop the thesis about a national conspiracy. To the extent that these comments lent any support to that thesis, they were either false or unconvincing. . . . Nevertheless, under the reasoning of New York Times, even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth or falsity."

The Court of Appeals indeed isolated the unique and important issue in this case: May a non-public person be defamed with impunity by a false statement which is irrelevant to the discussion of a matter which could possibly be termed a matter of public interest and importance? But, having isolated that issue, the Court of Appeals failed to give that issue the proper consideration which it deserved.

The central thesis of defendant's article was that the criminal trial of Richard Nuccio was the result of a Communist conspiracy to discredit the police in this country. In purportedly developing this thesis defendant went out of its way to draw plaintiff into this situation, although it is uncontradicted that plaintiff had no connection whatsoever with the criminal trial of Richard Nuccio or any purported conspiracy in connection with it. Plaintiff acted as a private attorney in private civil law suits for the parents of the boy who had been killed by Officer Nuccio. He made no public statements concerning the situation, nor was he in any way involved in the criminal trial. He stated no views regarding this matter publicly. At no time was he referred to publicly in connection with any of the cases involving Richard Nuccio.

None of the statements contained in the article referred to any of plaintiff's activities in connection with the Nuccio civil case. Starting from the fact that plaintiff represented the parents of the deceased boy, it then went on to defame him gratuitously by falsely stating that in the past he has been connected with various Communist and Communist-front organizations. Nothing said about plaintiff has any relation to his activities in regard to the Nuccio cases.

It has been held repeatedly and without exception that in order for a defendant to avail himself of constitutional

protection in a libel suit, his statements about the plaintiff must be in relation to plaintiff's public activities. *Belli* v. *Orlando Daily Newspapers,* 389 F. 2d 579 (5th Cir. 1967), cert. den. 393 U.S. 825; *Stearn* v. *MacLean-Hunter, Ltd.,* 46 FRD 76, 78 (SDNY 1969); *Afro-American Publishing Company* v. *Jaffe,* 366 F. 2d 649 (D.C. Cir. 1966).

Plaintiff is not attacked in the article for his views on the general subject matter of the article, and his views are not recounted or set forth as they relate to the fact situation discussed therein. He is, rather, attacked for what he had allegedly done previously, entirely unrelated to his private activities in connection with the civil suits against Nuccio.

To deprive plaintiff of his right to protect his essential dignity and reputation in this situation is to ignore his right to his own humanity. We have in this case competing interests which were not adequately explored by the Court of Appeals. This case does not involve a public statement about public activities of plaintiff regarding a matter of public interest and importance. Rather, it involves statements about a private individual concerning private actions having absolutely no connection with the matter of alleged public interest, except in the twisted and distorted mind of defendant. As was said by the Court of Appeals, "the addition of an unnecessary and irrelevant comment about a private individual is not automatically protected simply because it is contained in an article dealing generally with an important subject." Defendant deliberately went out of its way to attack plaintiff's alleged prior associations which had absolutely no connection with the criminal trial of the police officer, the main basis of the defamatory article.

The context in which Plaintiff was mentioned in the article was described thusly by the District Court:

> ". . . Caught up in the web of the alleged conspiracy, aside from Gertz, was such a disparate cast of characters as the Lake View Citizens Council, the Walker Report, a Roman Catholic priest, and the Chicago *Seed* (an underground newspaper). In fact, although Gertz's picture was displayed in the body of the article, he did not play a very prominent role in the article's expose of the purported war on police."

This situation calls into immediate play the interest of the State in protecting the individual against damage to his reputation. It cannot be said that there is automatic protection of the defendant in this case, under the First Amendment, when the defendant has made statements of and concerning plaintiff which have absolutely no connection with the central theme of the article. To so hold would allow each defendant to manufacture his own defense, thus abolishing the law of libel insofar as publishers are concerned, something which this Court has declined to hold in the past.

The fundamental error of both the District Court and the Court of Appeals was in failing to recognize that the policies which lead to the application of constitutional protection to matters of public interest is a flexible tool to be used in accordance with the legitimate policies behind the First Amendment. This does not mean that every person mentioned in an article is governed by the same rules. To do so would be to fall into the often condemned trap of exalting form over substance. Certainly different persons mentioned in the same article may be in different categories and subject to different rules. Clearly, the Assistant State Attorneys mentioned in the article are public officials and

fall within the ambit of First Amendment protection. Perhaps others mentioned in the article made public speeches and pronouncements regarding the subject matter, thereby thrusting themselves into the vortex of the controversy. But this does not mean that the mention of every person in an article dealing generally with a matter of possible public interest must thereby prove actual malice in the constitutional sense. To so hold would defeat the legitimate policy of protecting one who has not sought attack and who cannot defend himself. Such ruling would allow an unscrupulous publisher to bring in a person not legitimately connected with the subject matter of the article and defame him with a great measure of impunity in the guise of serving the greater public good. Such a result was never intended and would be a perversion of a laudable principle.

This is what occurred here. The gist of defendant's article was that the police in this country are being subjected to an attempt to discredit them by Communists, and that the criminal indictment and conviction of Nuccio was the result of such conspiracy. However, plaintiff had absolutely nothing to do with the criminal proceedings, as attested to by Nuccio's own attorney and even by defendant itself. Gertz represented private clients in a circumspect and inconspicuous manner. The attacks upon plaintiff was no legitimate part of the article or its subject matter.

When does a matter become a public issue of such nature as to bar a defamed plaintiff from recovery short of actual malice or gross recklessness? Is it when any extremist of the right or left or a mere zealot or crackpot declares it to be such, whether or not he is fair or reasonable? And how deeply must a plaintiff be involved in the matter in

order to prevent recovery on his part, assuming absence of actual malice or gross recklessness? If defendant's theory is adopted, all of us, including the most reputable lawyers, are at the mercy of those who lightly and without cause defame us.

Is every attorney, representing a client, to be exposed to the most scurrilous attacks, with absolutely no recourse? May a defamer concoct wholly fictitious stories about such an attorney which have no legitimate connection with the matter at hand? Are the members of the legal profession such public figures that they imperil their very livelihood to all unfounded attacks with absolutely no recourse? These issues must be considered very carefully and fully, not in an offhand manner.

It is submitted that these matters were not given the consideration which they require by the Court of Appeals. To say that the actual falsity of a statement does not deprive it of First Amendment protection adds little, if anything, to the policy decision which must be made. If the statements were true, there would be no issue, for this would be defense in itself. The question to be determined is not whether the statements are true or false, but whether the false statements are legitimately entitled to protection despite their falsity.

When a person or a corporation is at the center of an article, controversy or investigation, the result of which is of interest or concern to the public, there are strong policy considerations in favor of requiring a showing of actual malice in the constitutional sense. If it were otherwise, the right of the populace to obtain information would be effectively thwarted. The public indeed has a right to know about persons who have been arrested, (*Rosenbloom*

v. *Metromedia Inc.*, 403 U.S. 29, 91 S. Ct. 1811 (1971)), who consort with reputed gangsters (*Wasserman* v. *Time, Inc.*, 424 F. 2d 920, 922 (D.C. Cir. 1970), cert. den., 398 U.S. 940 (1970), *Time Inc.* v. *Ragano*, 427 F. 2d 219, 221 (5th Cir. 1970)), who delve into elections in foreign countries, *Time, Inc.* v. *McLaney*, 406 F. 2d 565, 573 (5th Cir. 1969), cert. den., 395 U.S. 922 (1969)), who deal in public health (*United Medical Laboratories* v. *Columbia Broadcasting System*, 404 F. 2d 706, 711-12 (9th Cir. 1968), cert. den. 394 U.S. 921 (1969), *Farnsworth* v. *Tribune Co.*, 43 Ill. 2d 286, 290-92, 253 N.E. 2d 408 (1969)), and who hold themselves out to accommodate the public (*Bon Air Hotel Inc.* v. *Time, Inc.*, 426 F. 2d 858, 860-62 (5th Cir. 1970)).

The same policies most emphatically do not allow a publisher to drag an innocent third party, who is not at the center of the public matter of an article, into a controversy for the mere purpose of defaming him, as was done here. Plaintiff was not being spoken of regarding the way in which he handled a case or represented a client, but he was spoken of as a Communist, a Marxist and a Leninist, completely divorced from anything else. What legitimate public purposes do such false and defamatory statements serve?

II.

PLAINTIFF WAS DENIED A FAIR TRIAL AND DUE PROCESS.

Throughout the entire proceedings in this cause, plaintiff proceeded on the assumption and theory that he was not a public figure, and that the subject matter of the article did not concern a matter of public interest and importance. The rulings of the trial court sustained this position throughout. In denying defendant's motion to strike, the District Court held that the article was libelous *per se*.

The court then struck those defenses contained in defendant's amended answer which attempted to raise the issue of public figure. The District Court then concluded that the publicity surrounding the Nuccio case was not relevant to the cause, and refused to allow defendant to introduce such evidence. Finally, the court held during the conference on jury instructions, that defendant was not entitled to raise the defense of the First Amendment privilege in this cause.

At the conclusion of the trial, the District Court held, for the first time, that plaintiff was required to prove actual malice in the constitutional sense, that he had not, and that therefore judgment must be rendered for defendant. Indeed, the trial court specifically precluded plaintiff from introducing much evidence at the trial (other than the continued widespread and substantial publication and distribution of the article and reprint) which would have indicated actual malice on the part of defendant. Then he was informed that his failure to produce this evidence was fatal to his case! Assuming that plaintiff is required to prove actual malice in the constitutional sense on the part of defendant, common fairness requires that he be awarded a new trial before a jury so that he has a full and fair opportunity to do so. At this point he has been deprived of such opportunity. The failure to afford plaintiff this right has deprived him of due process of law as guaranteed by the Fifth and Fourteenth Amendments. Nothing could be clearer.

That plaintiff could establish malice on defendant's part is evidenced by its continued and widespread publication and distribution of the admittedly defamatory article almost to the moment of trial and by the other facts and circumstances hereinafter set forth.

What is most surprising in the failure to grant plaintiff a new trial is that he had introduced much evidence of actual malice, in the constitutional sense, on the part of defendant, despite his not being required to produce such evidence. The presence of this evidence, which could be greatly elaborated upon and augmented at another trial, makes it clear that the failure to grant plaintiff an opportunity for such a trial deprived him of due process of law.

As was proved by plaintiff at trial, without any attempted contradiction by defendant, defendant's article did not contain simple exaggerations, discrepancies, or slight errors, but monumental misstatements, monstrous lies made out of whole cloth. There was not even the slightest basis for calling plaintiff a Communist, Communist-fronter, Leninist, Marxist, Red, or anything of that nature. These statements were not mere hyperbole or coloration, but completely false fabrications of the most damaging kind to an attorney dealing with private clients. Even if public issues were involved, defendant had no right to drag in and publish defamatory falsehoods about plaintiff who was an innocent bystander, representing purely private interests. The conclusions reached by this Court regarding the plaintiff in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 86 Supreme Ct. 1975 (1967), are clearly applicable to this case. Each of the following elements found in that case are present here: the story was in no sense "hot news"; elementary precautions were ignored; there was no support, independent or otherwise, for the statements made in the article; the author's notes were not viewed by any of defendant's personnel, but were published without substantial independent support; no attempt was made to check

with any of the others involved in this situation as to the accuracy of the statements made. As was stated in *Butts*, "the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

There is no question that defendant is not what can be termed "a responsible publisher." It has a specific aim and viewpoint—to further the views of the John Birch Society, its parent organization. In fact, this article was not merely submitted by an independent writer, but was solicited and designed, in effect, and tailored by the managing editor of defendant, knowing that Stang, the writer, had previously labeled both Richard Nixon and Hubert H. Humphrey Marxists and lumped them with Eisenhower, Paul Hoffman, Nelson Rockefeller and other great Americans as conniving with the Communists. This is the kind of dastardly defamation upon which Stanley based his conclusion that Stang's facts are always accurate! His real attitude is reflected by his failure to produce Stang for examination.

Defendant cannot disavow Stang's defamation of plaintiff, because it vouched for the truth thereof in the very issue in which the article appeared. In the words of its managing editor, Scott Stanley, Stang had "conducted extensive research into the Richard Nuccio case," had "gotten the facts," and "that this is a part of the communist war on our police is as certain as the innocence of the officer they have chosen as their symbolic target." Stanley admitted at the trial that he had absolutely no basis for making these assertions, other than from the text of the article itself and the "implied relationship between an author and an editor." Indeed, there is much undisputed evi-

dence in the record to show either actual malice or gross recklessness, including the following:

a) For months following the filing of plaintiff's complaint, which put the defendant on notice of the defamatory statements contained in the article and reprint, and after service of process on it, defendant continued to sell and distribute many copies in Illinois and throughout the country. This in itself is evidence of malice. 33 Illinois Law & Practice, Slander & Libel § 122.

b) Defendant made no effort whatsoever to check the accuracy of any of the statements prior to publication, despite its knowledge that plaintiff is a lawyer, necessarily dependent upon maintaining his professional and community reputation.

c) Defendant must have known that it is extremely serious to call a lawyer a Communist, or Communist-Fronter, or Marxist, or Leninist or anything similar and this should have put it on notice to check carefully.

d) Since American Opinion is a monthly publication without the deadlines common to the daily press, it had ample opportunity to check the statements in the article.

e) Defendant was in an excessive hurry to publish and distribute the article and reprint.

f) Defendant's managing editor himself vouched for the accuracy of the article although admittedly he had no actual knowledge upon which to base such representation.

g) Defendant's managing editor himself placed defamatory captions with respect to plaintiff in the article.

h) Reprints of the article were literally forced upon people on the North side of Chicago, where plaintiff resides.

i) Defendant persisted in repeating the false charge that plaintiff is a Communist-fronter in its answers to plaintiff's interrogatories, despite the true information imparted to it in the complaint.

j) Defendant persisted in repeating the same defamatory statements about plaintiff from the witness stand during the trial.

k) Defendant misrepresented to the court and plaintiff the status of the author of the article, thus leading the court to make an incorrect ruling and precluding plaintiff from cross-examining Stang as adverse witness.

l) Stang did not contact Kachigian, Nuccio's attorney, nor did he contact Gertz. There is no evidence that he contacted others with knowledge of the facts. Defendant did not establish Stang's good-faith research. It carefully refrained from calling him to the stand for fear that his and its malice would be patent.

Thus, the testimony at the trial, coupled with the clear pattern of prior statements by defendant show that the article herein was one of a long line, which were not made with any thought of truth or accuracy in mind, but solely to advance the theories of defendant's parent organization, the John Birch Society, from which defendant receives $1,000,000.00 annually for disseminating its views. (Plaintiffs' Exhibit 4).

The appropriate rules to be applied here are set forth in *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (2d Cir. 1969), cert.

den. 396 U.S. 1049, reh. den. 397 U.S. 978 where it is said at 337:

> "Reliance upon newspaper articles, books, and campaign literature, and upon accurate reprinting of another's letter are only factors which, with other factors, are probative of whether the publisher of the cumulated material was motivated by actual malice when he caused the full material to be published. Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports. St. Amant v. Thompson, supra at 732, 88 S. Ct. 1323. Furthermore, in our case, Ginzburg added certain innuendoes to some quoted statements and quoted other statements out of context in order to support his predetermined result. One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context."

Here, there was much reason to doubt the veracity of Stang, despite the disclaimers of Stanley. Anyone who writes that Richard Nixon, Hubert Humphrey and Dwight Eisenhower are Communists, or are working for the Communists has little claim to credibility. Defendants are not allowed to state categorically that they relied upon Stang, for it was Stanley who set Stang upon the trail, asking for a story saying exactly what was ultimately printed. He, in behalf of defendant, vouched for Stang's accuracy, and caused reprints of this important article to be circulated throughout the United States, both at bookstores owned by the John Birch Society, and on street corners as well. And, after being placed on notice of the utter falsity of the

charges, these distributions continued, and Stanley attempted to repeat the libelous statements in his answers to interrogatories filed on behalf of defendant, and at trial, with absolutely nothing to support them. As was said in *Goldwater,* 414 F. 2d at 339-40:

> "There are many parallels between the evidence tending to prove actual malice in this case and the proof in Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), which the Supreme Court held was sufficient to establish actual malice. The Goldwater article did not contain 'hot news'; the appellants were very much aware of the possible resulting harm; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques; . . . and, obviously, there was evidence as to whether there was a possible preconceived plan to attack Senator Goldwater regardless of the facts. This evidence, together with the other facts brought out at trial established that the appellants not only knowingly published defamatory statements but also established with convincing clarity that the appellants were motivated by actual malice when they published these defamatory statements."

So also here, there is no question but that defendants had a pre-conceived plan to attack plaintiff, as well as the others mentioned in the article, and that the plan was to label all such persons communists, regardless of the facts. Defendant cannot sidestep responsibility for these calculated statements by saying that they relied upon Stang. They did not rely upon him, but sent him out to write this very article, telling him beforehand what he was to say. This is actual malice at its worst, and refusal to at least grant plaintiff a new trial was a grave miscarriage of justice.

III.

THE TAXATION OF COSTS AGAINST PLAINTIFF DEPRIVED HIM OF DUE PROCESS.

Under the provisions of Rule 39(a), Federal Rules of Appellate Procedure, the taxing of costs "shall be taxed against the appellant unless otherwise ordered," indicating that this matter is one which is to be considered in light of justice to the parties involved. The Court of Appeals taxed costs against plaintiff in the amount of $2,021.30, and denied plaintiff's petition to reconsider that order.

The decision of the Court of Appeals was a close one, as indicated in the opinions filed by the Judges of that court. It extended the previously existing law, as recognized by all parties concerned. Plaintiff had obtained a verdict from a jury, under the instructions given by the District Court, which then radically changed its view of the applicable law.

There is no doubt that plaintiff presented to the Court of Appeals, and now presents to this Court, important matters of public policy pertaining to all attorneys, as well as others, and their rights in the field of libel and slander.

In light of these facts, the taxing of costs against plaintiff is grossly unjust, particularly where defendant's counsel admitted in his closing argument to the jury that the statements made of and concerning plaintiff were false.

CONCLUSION.

This case presents issues of the utmost public importance. A victory for plaintiff would shore up our defenses against extremists of the right and of the left who would destroy the American democratic values and citizen participation in public affairs by misreading and misusing the freedom of expression guaranteed by the First Amendment. This does not constitute a quest for censorship or prior restraint of any kind, but only a plea that those who set out intentionally to defame a private person with no basis whatsoever, will be called to a court of law to account for their actions. This is further a plea that a private person, who has no other recourse but the courts, be allowed an opportunity to clear his name and reputation.

Wide leeway has been given to publishers and others to speak to the public where public officials, public figures and public issues are actually involved; provided the defamatory publication really treats the complaining person in his public capacity and the publisher is free from actual malice or such gross recklessness as is tantamount to malice. There can be no license to drag the name of innocent bystanders in the mud by making utterly false and highly damaging charges against them in the most irresponsible manner where the truth is readily available and could easily have been ascertained.

Defendant here made absolutely no attempt to prove the truth of the statements made concerning plaintiff, either at the time of publication or at the trial.

No lawyer's reputation will be safe if the mere fact of his being a lawyer is used to undermine his reputation and standing with clients, the courts and the public. Our system of justice will suffer if a lawyer must hesitate to represent private litigants because extremists may lie about him with impunity. The quality of justice in this country will thus be lowered if an attorney must, before concluding to represent a client, consider whether he is exposing himself to public attacks without an adequate opportunity on his part to vindicate himself. Public policy should favor a strong lawyer-client relationship, rather than weakening it while giving extremists carte blanche.

Wherefore, petitioner prays that this Court's Writ of Certiorari issue and that the judgment below be reversed.

Respectfully submitted,

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APPENDIX "A"

Opinion of the U. S. Court of Appeals

Before KNOCH, *Senior Circuit Judge,* KILEY and STEVENS, *Circuit Judges.*

STEVENS, *Circuit Judge.* Plaintiff's appeal[1] from an order entering judgment in favor of defendant notwithstanding the jury's $50,000 verdict presents two questions: (1) whether the First Amendment privilege as construed in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, protects defendant's false and scurrilous comments about the plaintiff; and (2) if the privilege does apply, was the evidence insufficient to permit the jury to find that defendant's comments were made "with 'actual malice' —that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Id.* at 280.

Plaintiff is a reputable lawyer. Defendant published an article describing him as a "Communist-fronter," "Leninist," and participant in various "Marxist" and "Red" activties. The author of the article is not a party and did not testify. We assume, without deciding, that, as the district court held, the article was libelous *per se* as a matter of Illinois law and that its author was either deliberately or recklessly mendacious. Our concern is with the tension between the responsibility and the First Amendment freedom of the publisher.

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[1] Defendant cross appeals in No. 71-1175. Our disposition of plaintiff's appeal in No. 71-1174 makes it unnecessary to consider or decide any of the issues raised in the cross appeal.

I.

The libel was published in the April 1969 edition of *American Opinion*. The magazine's managing editor, one Stanley, explained its editorial policy, method of operation, and how the libelous article was commissioned.

Early in the 1960s, in furtherance of the aims of the John Birch Society, *American Opinion*, and an affiliated publication also edited by Stanley, began to promulgate "information" about a "nation-wide conspiracy to harass and intimidate the police." *American Opinion* published many articles by a number of different authors on this subject. One of them was Alan Stang, the contributor of the libel in suit. Stang was never employed by defendant or any of its affiliates, but had been a regular contributor since 1963. He was recommended to Stanley as an "accurate researcher and analyst" with professional training and experience.[2] His services were engaged by Stanley for special assignments consistent with the aims

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[2] In his affidavit in support of defendant's motion for summary judgment, Stanley stated in part:

"6. My first acquaintance with Allen Stang came as a result of the personal recommendations of two men. They are Samuel L. Blumenfeld, an editor formerly with Rinehart & Company, the Viking Press, The World Publishing Company, and Grosset & Dunlap. The other person recommending Mr. Stang was Noel E. Parmentel who was an essayist for several publications, among which were the *New Yorker*, *Esquire* and *National Review*. He was also a television writer and producer. Both Mr. Blumenfeld and Mr. Parmentel stressed Mr. Stang's ability as an accurate researcher and analyst.

"7. I was also advised that Allen Stang held an B. A. degree from City College of New York and a Masters degree from Columbia University. Further, that he was a business editor for Prentice-Hall Inc. and was a professional writer and researcher for NBC and for such network features as *Mike Wallace Interview* and *Biography*."

of the John Birch Society. Between 1963 and 1969 he wrote about 35 articles for Stanley.

Although Stang's articles provoked many letters, some strongly adverse, according to Stanley none challenged the truth of any of Stang's factual averments. Prior to the article in suit, none was the subject of a demand for retraction or a libel suit.

In December, 1968, Sanley requested Stang to prepare an article on the murder trial of a Chicago police officer named Nuccio. Stang accepted, came to Chicago to make an investigation, consulted with Stanley over the long distance telephone a few times, and submitted his completed draft on February 18, 1969, in time for inclusion in the April edition which was scheduled for distribution in early March. Stanley made no effort to verify the accuracy of anything said in Stang's article. Based on statements in the text, Stanley drafted an introductory comment[3] and captions for illustrations.[4] Before the article was conceived, Stanley, whose office is in Boston, had never heard of the plaintiff.

The article is 18 pages long. It is concerned with the trial and conviction of officer Nuccio for the crime of

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[3] "Alan Stang is a former business editor for Prentice-Hall, Inc., and a television writer, producer, and consultant. Mr. Stang is a frequent contributor to AMERICAN OPINION and is author of the Western Islands best-sellers, *It's Very Simple* and *The Actor*. Alan Stang has just returned from an investigative trip to Chicago, where he conducted extensive research into the Richard Nuccio Case."

[4] For example:
"Officer Richard Nuccio, shown here with one of his three children, was framed for murder"; and "Elmer Gertz of Red Guild harasses Nuccio."

murdering a 17-year old boy named Nelson. The article is intended to persuade the reader that Nuccio was the victim of a "frame-up," and that the frame-up was part of a national conspiracy to discredit local police forces; the purpose of that conspiracy is to lay the groundwork for the creation of a national police force, which, in turn, is a step toward a totalitarian state.

The article purports to analyze the evidence against Nuccio so incisively that the falsity of several witnesses' testimony at Nuccio's trial, and the error of the trial judge's finding of guilt, will be manifest to the reader.[5]

Plaintiff is mentioned because he was retained by the Nelson family to assert a civil claim for damages against Nuccio. In that capacity, he attended the coroner's inquest into Nelson's death. Notwithstanding his limited, professional interest in the matter, the article implied that plaintiff was the architect of a gross miscarriage of justice. A purported relationship to a nationwide conspiracy was suggested, in part, by frequent references to the National Lawyers Guild, of which plaintiff had been a member and which Stang repeatedly described as a Communist front.

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[5] The district court summarized the article:

"A closer examination of the article shows that its theme was more general and far reaching than just the trial of one Chicago policeman for murder. Instead, it painted the picture of a conspiratorial war being waged by the Communists against the police in general. Caught up in the web of the alleged conspiracy, aside from Gertz, was such a disparate cast of characters as the Lake View Citizens Council, the Walker Report, a Roman Catholic priest, and the Chicago *Seed* (an underground newspaper). In fact, although Gertz's picture was displayed in the body of the article, he did not play a very prominent role in the article's expose of the purported war on police."

About 42,000 copies of the magazine were distributed nationally and about 86,000 reprints were printed, of which about 5,000 were sold or given away in Illinois. The article came to plaintiff's attention because a copy was handed to his partner's wife while she was shopping. He promptly filed this libel action in the federal court, alleging that various statments in the article were false and defamatory.

Ruling on various pretrial motions, the district court held as a matter of law that the publication was libelous *per se,* and that applicability of the *New York Times* standard depended on issues of fact that could not be resolved on summary judgment.

At the trial plaintiff established that defendant had made no independent verification of any of the statements in Stang's article, that critical comments about plaintiff were false and unsupported, and that plaintiff was a well known and well regarded member of the Illinois bar.[6] Defendant sought to prove that it was justified, on the basis of past experience, in assuming, without checking before publishing it, that Stang's article was accurate. Defendant also offered to prove that it did in good faith seek to verify the statements about plaintiff after the suit was filed, but the court sustained plaintiff's objection to the relevance of this testimony.

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[6] The district court stated:

"At trial, Gertz testified as to his stature and reputation in the community. He is a prominent attorney in Chicago, having represented clients who sometimes command a wide following in the press and media. He has written books, articles and reviews which have enjoyed wide circulation. He has appeared frequently on radio and television, and has delivered numerous speeches. And he has long been involved in civic affairs."

No proof of actual damages was offered. Under the court's instructions, the jury was permitted to presume injury as a matter of law. As noted, it assessed plaintiff's damages at $50,000. The district court set aside the verdict and granted defendant's motion for judgment n.o.v. In a thorough memorandum, the court concluded that even if plaintiff himself was not a public figure, the subject matter of the article was clearly of public interest,[7] and that although defendant's failure to check the accuracy of the article was negligent, the evidence presented at the trial was not sufficient to support a finding of actual malice or reckless disregard for the truth.

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[7] "By analogy to the above cases, and to those cited in *Bon Air Hotel, Inc.* v. *Time, Inc.*, [426 F. 2d 858,] at 861, n. 4 [(5th Cir. 1970)], I think that the subject matter of 'Frame-Up' was clearly one of public interest protected by the First and Fourteenth Amendments. A Chicago policeman's killing of a criminal suspect, and the policeman's subsequent indictment for murder at a time when the police generally were the subject of attacks within the community, commanded wide public attention and interest. By representing the victim's family in litigation brought against the policeman, Gertz thrust himself into the vortex of this important public controversy. *Curtis Publishing Co* v. *Butts*, [388 U.S. 130,] at 155. In affording First Amendment protection to defendant's publication, I reiterate that Gertz played a small part in the vast sweep of the whole article. What this court concerns itself with primarily is the public's right to become informed on a matter of public interest, rather than with any right to know about persons who have injected themselves into the limelight on that matter. See *United Medical Laboratories* v. *Columbia Broadcasting System*, [404 F. 2d 706] at 712 [(9th Cir. 1968), *cert. denied*, 394 U.S. 921]. The penumbra of First Amendment protection falls equally on references to Gertz, the Lake View Citizens Council, the policeman charged with murder, and the Chicago *Seed*."

II.

Plaintiff's principal contention on appeal is that the standard of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, is inapplicable because he is not a public figure and, insofar as the article related to him, it did not concern a matter of public interest.

Plaintiff's considerable stature as a lawyer, author, lecturer, and participant in matters of public import undermine the validity of the assumption that he is not a "public figure" as that term has been used by the progeny of *New York Times*. Nevertheless, for purposes of decision we make that assumption and test the availability of the claim of privilege by the subject matter of the article. The question then is whether the article, taken as a whole, and more narrowly in its references to plaintiff, is of any *significant* public interest.[8]

Considering either the article's specific topic—the trial of a Chicago police officer for the crime of murder—or its broader theme—the possible existence of a nationwide conspiracy to discredit local police officers—it is clear that the district court was correct in holding that there is significant public interest in the subject matter of the article. Discussion and debate about matters of this character merit the kind of First Amendment protection that the Supreme Court described in *New York Times Co.* v. *Sullivan* and later cases extending its rationale to include not only comment on public officials, but public fig-

[8] With deliberation we have included the word "significant" in our statement of the question because we are convinced that areas of privacy remain beyond the coverage of the *New York Times'* protective shield. In our view mere public curiosity about private matters is not the kind of "public interest" that the standard contemplates. See *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 44 n. 12, 45 n. 13, 48 (opinion of Mr. Justice Brennan).

ures and public issues as well. See *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 47-52 (opinion of Mr. Justice Brennan).

It is less clear, however, that the false comments about the plaintiff are worthy of the same protection. It is one thing to omit the word "alleged" from an otherwise accurate comment on a newsworthy subject;[9] it is quite another to include a gratuitous and collateral remark about a participant in a public controversy. The omission, even if it makes the comment false, does not enlarge its subject matter beyond the area in which First Amendment protection is properly afforded. But the addition of an unnecessary and irrelevant comment about a private individual is not automatically protected simply because it is contained in an article dealing generally with an important subject. Otherwise a few introductory platitudes might be used as a justification for false and destructive invasions of the privacy of ordinary citizens. *Cf. Kois* v. *Wisconsin*, ... U.S. ....., 40 U.S.L.W. 3615 (June 26, 1972).

In this case, the alleged "Communist front" associations of the lawyer for the Nelson family were quite irrelevant to the question of Nuccio's guilt or innocence of the crime of murder. They were inserted in order to develop the thesis about a national conspiracy against the police. To the extent that these comments lent any support to that thesis, they were either false or unconvincing. Alhough more credible and respectable authors than Stang or Stanley have written on the same theme,[10] we may

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[9] See *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 55 (opinion of Mr. Justice Brennan); *Time, Inc.* v. *Pape*, 401 U.S. 279.

[10] See, *e.g.*, Inbau, Behind Those "Police Brutality" Charges, a 1966 *Reader's Digest* article reproduced in the Supplemental Appendix at p. 117.

also assume that the article's basic thesis is false. Nevertheless, under the reasoning of *New York Times Co.* v. *Sullivan,* even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth or falsity. It would undermine the rule of that case to permit the actual falsity of a statement to determine whether or not its publisher is entitled to the benefit of the rule.

If, therefore, we put to one side the false character of the article and treat it as though its contents were entirely true, it cannot be denied that the comments about plaintiff were integral to its central thesis. They must be tested under the *New York Times* standard.

III.

There is no evidence that Stanley actually knew that Stang's article was false; defendant did not "deliberately publish falsehoods." The question is whether the publication was made recklessly. The Supreme Court has made two propositions abundantly clear. Both, as well as a third consideration which we shall mention, support the district court's appraisal of the issue.

First, the mere fact that a publisher fails to verify the accuracy of defamatory statements in an article submitted by an author whom he could reasonably assume to be trustworthy is not sufficient to establish a reckless disregard for the truth. On several occasions the Court has expressly stated that the record must reveal a "high degree of awareness of . . . probable falsity" before a

publisher may be found to have acted recklessly.[11] In this case there is no evidence that Stanley knew anything at all about plaintiff except what was contained in Stang's article.

Second, the Court has plainly stated that the evidence establishing reckless disregard for the truth must be clear and convincing, and that an appellate court has an independent obligation to make its own analysis of the record before a finding that a comment was reckless may be approved.[12] Unquestionably, in a close case the policy of encouraging free and uninhibited expression is to be preferred over the conflicting policy of deterring irresponsible defamatory comment. Apart from the failure to verify Stang's facts, and an apparent disposition to assume that a lawyer who could file a civil rights case

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[11] *St. Amant* v. *Thompson*, 390 U.S. 727, 731; *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 84-85; *Garrison* v. *Louisiana*, 379 U.S. 67, 74-75. In his opinion in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, Mr. Justice Harlan stated the standard for plaintiffs who are not public figures as merely requiring ". . . a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. However, in that case, the publisher had been notified prior to publication, both by the plaintiff and by his daughter, that the material about to be printed was false. *Id.* at 161 n.23. Moreover, as we read the subsequent opinions, although Justices Stewart and Marshall, and perhaps Justice White, may have adopted Mr. Justice Harlan's less severe standard (see *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 57-62 (opinion of Mr. Justice White), 62-78 (opinion of Mr. Justice Harlan), 78-87 (opinion of Mr. Justice Marshall with whom Mr. Justice Stewart joined), at least the Chief Justice and Justices Douglas, Brennan and Blackmum have unequivocally rejected it. Thus, the majority of the present Justices who have spoken to the point would not relax the *New York Times* standard in a case not involving a public official.

[12] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285-286; *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 55 (opinion of Mr. Justice Brennan); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 83.

against a policeman may well be a "Communist fronter," there is no evidence that Stanley acted recklessly within the Supreme Court's definition of that term. To assume that Stanley must have known, on the basis of information received from Stang over the telephone or from some other source, that the comments about plaintiff were false, would itself be reckless. Our examination of the record satisfies us that "'the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands. . . .' 376 U.S., at 285-286." *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 83, quoting from the *New York Times* case.[13]

Third, if the issue were doubtful, we would defer to the conclusion of the trial judge. Having heard the testimony and observed Stanley on the witness stand, and even though he expressed understandable concern about the wisdom of the rule he felt obligated to apply, he concluded unequivocally that the evidence did not meet the *New York Times Co.* v. *Sullivan* standard.[14]

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[13] One distinction which is lost in some of plaintiff's arguments should be kept in mind. "[I]ll will toward plaintiff, or bad motives, are not elements of the *New York Times* standard." *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 52 n. 18 (opinion of Mr. Justice Brennan). Thus, the kind of malice which will, for example, defeat a conditional privilege in the traditional tort law of libel, will not satisfy the *New York Times* standard. However bad its motives, a publisher is protected by the First Amendment as long as the allegedly libelous statements were not made with knowledge of falsity or with reckless disregard of whether they were true or false.

[14] "THE COURT: I can say now, without any question and it will appear of record in the case, that on the basis of the evidence that I have heard, that if I—if I should hold, or some other court should hold, that he is a public figure, that so far as the rest of the evidence is concerned, I would direct a verdict on the question of malice, on the evidence that I have heard. I wouldn't even submit it to the jury." S.A. 88.

Finally, by reference to matters not in evidence, plaintiff in effect asks us to take judicial notice of a reckless disregard for the truth on the part of the John Birch Society and its affiliates.[15] Unquestionably, a judge's sym-

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[15] Plaintiff makes three arguments that were not pressed below. (1) He contends that recklessness is established by the fact that representatives of the John Birch Society have previously referred to great Americans, such as President Eisenhower, as "Communists," and that certain of its procedures contemplate the deliberate use of propaganda that may well be inaccurate. This contention is unsupported by any evidence in the record. Plaintiff does argue that he was prevented from introducing all of his evidence on actual malice because the trial court had previously ruled—contrary to its reassessment of the situation at the time of the motion for judgment n.o.v.—that the *New York Times* standard did not apply. However, plaintiff did present evidence of malice (both the "constitutional" and the "ill will" type) to support his damage claim and no such evidence was excluded; at least he points to no occasion when he made an offer of proof of relevant evidence which was refused. Even if the references to President Eisenhower had been offered, such evidence would not meet the *New York Times* standard. Plaintiff does not contend that Stanley knew him or anything about him when the article from Stang was received. At most the "Eisenhower" evidence tends to prove that Stanley would be less disposed than another editor to question the author's characterization of plaintiff. (2) He contends that continued distribution of the April edition of *American Opinion* after this litigation was commenced establishes defendant's recklessness; however, defendant offered evidence for the purpose of proving a good faith post-complaint attempt to verify the charges, and plaintiff persuaded the court to exclude such evidence on the ground that ". . . anything that was done after the publication of the article [is] entirely irrelevant to these proceedings." S.A. 104. (3) Plaintiff seems to contend, on appeal, though he never so argued at trial, that since Stang was described as a "contributing editor" in later issues of the magazine, though not in the April 1969 issue, that defendant should be held liable on a *respondeat superior* doctrine for the malice of Stang. We do not find the later "contributing editor" characterization, in itself, sufficient to change the free-lance character of Stang's relationship with defendant. No other evidence of an employer-employee relationship was proffered. Thus, we also find no error in the trial court's refusal to order defendant to produce Stang for examination as an adverse witness.

pathetic reaction to the point of view expressed in an article which has been found to contain libelous matter may make it easier for him to afford a publisher First Amendment protection.[16] We cannot, however, apply a fundamenal protection in one fashion to the New York Times and Time Magazine and in another way to the John Birch Society.[17] Whether we are moved to applaud or to despise what is said, our duty to defend the right to speak remains the same.

The judgment is affirmed.

KILEY, *Circuit Judge*, concurring.

I concur. Judge Stevens has written a persuasive opinion. It is with considerable reluctance, however, that I concur. The reluctance is due to my fear that we may have in this opinion pushed through what I consider the outer limits of the First Amendment protection against liability for libelous statements and have further eroded the interest of non-"public figures" in their personal privacy.

Gertz, a reputable attorney, is virtually called a Communist in an article written by Stang and adopted by Stanley without the latter making any inquiry on his own as to whether there was a reasonable basis for calling Gertz a Communist.

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[16] See Kalven, The New York Times Case; a Note on "the Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 200.

[17] See *Police Department of the City of Chicago* v. *Mosley*, ... U.S. ....., 40 U.S.L.W. 4877, 4878 (June 26, 1972).

This is not the *Rosenbloom* case, 403 U.S. 29 (1971), Rosenbloom was the publisher of "nudist magazine," and the news broadcast by defendant implicitly referred to Rosenbloom as a "smut distributor" and a "girly-peddler." The involvement of the non-"public figure" with an issue of public interest is a consideration which moved the Supreme Court to apply the *New York Times* rule in *Rosenbloom*. I cannot find that Gertz was closely involved with the asserted national Communist conspiracy, as Rosenbloom was with the "smut literature racket."

Yet Judge Stevens shows that the trend of the Supreme Court decisions requires "in this close case" the conclusion that the district court did not err in entering the judgment for defendant, notwithstanding the verdict for Gertz.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

Opinion of the U. S. District Court

In this motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, defendant Robert Welch, Inc. seeks to reverse the verdict of a jury which found him responsible for the libel *per se*[1] of plaintiff Elmer Gertz. Damages of $50,000 were awarded.

The libel was published as the lead article in the defendant's monthly magazine *American Opinion* under the title "Frame-Up" with a sub-title "Richard Nuccio and the War on Police". Reprints of the article were made available immediately and were widely circulated. Nuccio was a Chicago policeman who was charged with the murder of Ronald Nelson, and the article dealt with Nuccio's murder trial and subsequent conviction. Gertz, an attorney, had been retained by the Nelson family. He represented them at the deceased's inquest, and he filed suit in their behalf in federal court. At page 12 of the 19 page article Gertz is labeled a "Leninist . . . who now turns up as lawyer for the Nelsons," and at page 17 he is described as a "Communist fronter".

One of the principal defenses at trial, and the basis for this motion, was that Gertz was a "public official" within the meaning of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964), or more properly, that he

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[1] In denying defendant's motion to dismiss, it was held that the complaint sufficiently averred a libel *per se* under Illinois law, and not merely a libel *per quod*. *Gertz* v. *Robert Welch, Inc.*, 306 F. Supp. 310 (N.D. Ill. 1969).

was a "public figure" within the meaning of *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 153-155 (1967), thus precluding a recovery of damages for a defamatory falsehood unless actual malice is shown. In denying cross motions for summary judgment, the court refused to hold as a matter of law that defendant had published with actual malice. Memorandum Opinion of September 16, 1970. Instead, factual issues raised in the affidavits required that the matter be submitted to a jury. F.R.Civ.P. 56(c).

At trial, Gertz testified as to his stature and reputation in the community. He is a prominent attorney in Chicago, having represented clients who sometimes command a wide following in the press and media. He has written books, articles and reviews which have enjoyed wide circulation. He has appeared frequently on radio and television, and has delivered numerous speeches. And he has long been involved in civic affairs.

Despite the above, the court held, in effect, that Gertz was not a public figure. In instructing the jury, the court determined that the publication in question was libelous *per se*. All issues were withdrawn from the jury except the proper measure of damages.

A closer examination of the article shows that its theme was more general and far reaching than just the trial of one Chicago policeman for murder. Instead, it painted the picture of a conspiratorial war being waged by the Communists against the police in general.[3] Caught up in the

[3] Immediately following the reprint of the article is a list of additional readings on the subject of the war against police, published by defendant. One of the items is entitled "The Communist Attack On The U.S. Police."

web of the alleged conspiracy, aside from Gertz, was such a disparate cast of characters as the Lake View Citizens Council, the Walker Report, a Roman Catholic priest, and the Chicago *Seed* (an underground newspaper). In fact, although Gertz's picture was displayed in the body of the article, he did not play a very prominent role in the article's exposé of the purported war on police.

At trial, Scott Stanley, Jr., the Managing Editor of *American Opinion,* testified that he had commissioned Alan Stang, a free-lance writer, to write the article. Stang had written for defendant in the past, and Stanley had always found him accurate. Stanley had never had cause to question the contents of any article that Stang had written, and to his knowledge there had not been any lawsuits arising out of Stang's articles. Relying on what he observed to be Stang's past history of accuracy, Stanley did not check the accuracy of "Frame-Up" personally.[3] While it may be that the failure to check the accuracy of the article was negligent, Stanley clearly did not act with actual malice or with reckless disregard for the truth. See *New York Times Co.* v. *Sullivan,* 376 U.S. at 287-288.

Plaintiff having failed to establish actual malice on the part of defendant, the issue presented in this motion is whether the court properly concluded that Gertz was not a public figure. If the conclusion was proper, then the award of $50,000 by the jury was not constitutionally impermissible. However, if the court erred in holding that Gertz was not a public figure, then under the rule in

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[3] He had never heard of Gertz prior to reading the article, and had no reason to doubt the veracity of what Stang wrote about Gertz.

N. Y. Times v. *Sullivan, supra* at 279-280, and *Curtis Publishing Co.* v. *Butts, supra* at 155, the article would be privileged under the First and Fourteenth Amendments, and the award of damages therefor would have been improper.

The issue is not as simple, of course, as the question of whether Gertz is a public figure. The penumbra of material protected by the guarantee of freedom of speech has been extended to include matters of public interest, whether or not public officials or public figures are involved.

> "One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press." *Time, Inc.* v. *Hill,* 385 U.S. 374, 388 (1967).

The rationale for affording First Amendment protection to matters of public interest, as implied by *Hill, supra,* is that our system of government places great value of society's open discussion of not only public officials (*Sullivan*) and public figures (*Butts*), but also matters of public interest (*Hill*). A person alegedly defamed by matter pertaining to the public interest must satisfy a heavy burden, i.e. a showing of actual malice, in order to recover therefor. The rationale of *N. Y. Times* v. *Hill* (sic) has been applied to several decisions of the Courts of Appeal recently, all of which extend the guarantee of free speech to matters of public interest.

For instance, a private individual's arrest for the sale of allegedly obscene material has been held to be a matter of public interest. *Rosenbloom* v. *Metromedia, Inc.*, 415 F. 2d 892, 894-896 (3d Cir. 1969), *cert. granted*, 397 U.S. 904 (1970). A picture of a lawyer eating lunch with reputed gangsters has been found to be of public interest. *Wasserman* v. *Time, Inc.*, 424 F. 2d 920, 922 (D.C. Cir. 1970), *cert. denied*, 398 U.S. 940 (1970); *Time, Inc.* v. *Ragano*, 427 F. 2d 219, 221 (5th Cir. 1970). To the same effect are stories concerning the administration of public health, *United Medical Laboratories* v. *Columbia Broadcasting System*, 404 F. 2d 706, 711-712 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969), and the influence of a reputed gambler in the election of the premier of the Bahamas, *Time, Inc.* v. *McLaney*, 406 F. 2d 565, 573 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969). Finally, it has been held that the condition of a hotel serving guests at a national golf tournament is a matter of public interest. *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F. 2d 858, 860-862 (5th Cir. 1970). See also, *Farnsworth* v. *Tribune Co.*, 43 Ill. 2d 286, 290-292, 253 N.E. 2d 408 (1969).

By analogy to the above cases, and to those cited in *Bon Air Hotel, Inc.* v. *Time, Inc.*, *supra* at 861, n. 4, I think that the subject matter of "Frame-Up" was clearly one of public interest protected by the First and Fourteenth Amendments. A Chicago policeman's killing of a criminal suspect, and the policeman's subsequent indictment for murder at a time when the police generally were the subject of attacks within the community, commanded wide public attention and interest. By representing the victim's family in litigation brought against the policeman, Gertz thrust himself into the vortex of this im-

portant public controversy. *Curtis Publishing Co.* v. *Butts, supra* at 155. In affording First Amendment protection to defendant's publication, I reiterate that Gertz played a small part in the vast sweep of the whole article. What his court concerns itself with primarily is the public's right to become informed on a matter of public interest, rather than with any right to know about persons who have injected themselves into the limelight on that matter. See *United Medical Laboratories* v. *Columbia Broadcasting System, supra* at 712. The penumbra of First Amendment protection falls equally on references to Gertz, the Lake View Citizens Council, the policeman charged with murder, and the Chicago *Seed*.

Having already concluded that there was not sufficient evidence presented at trial to support a finding of actual malice or reckless disregard for the truth, judgment notwithstanding the verdict should be entered for the defendant. *N. Y. Times* v. *Sullivan,* 376 U.S. at 286-288; F.R.Civ.P. §50(b). The motion for a new trial is conditionally denied, since no jury could reasonably find that defendant acted with actual malice. F.R.Civ.P. §50(c); *cf. Neely* v. *Eby Construction Co.,* 386 U.S. 317, 322 (1967), *reh. denied,* 386 U.S. 1027 (1967).

Accordingly, the verdict for plaintiff is set aside and defendant's motion for judgment notwithstanding the verdict is granted. F.R.Civ.P. §50(b).

Enter:

/s/ Bernard M. Decker
United States District Judge.

Dated: December 8, 1970

APPENDIX "C"

Order of the U. S. Court of Appeals
September 7, 1972

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.